FILE C

Supreme Court of the United States

OCTOBER TERM, 1958

No. 940

PAUL CASTELLANO,

Petitioner,

—against—

THE COMMISSION OF INVESTIGATION OF THE STATE OF NEW YORK, by MYLES J. LANE, Chairman, JACOB GRUMET, JOHN W. RYAN, JR., GOODMAN A. SARACHAN, Commissioners,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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To the Honorables, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Preliminary Statement

A petition is here sought for a writ of certiorari to the New York Court of Appeals to review an order of that Court, entered March 13, 1959. Petitioner has also instituted in this Court an appeal from the same order (October Term, 1958, No. 939), alleging in that appeal different errors of law. The Commission has filed a Motion to Dismiss that appeal. In the interest of brevity the Commission will incorporate by reference its Preliminary Statement. The Constitutional

Provisions and Statutes Involved, and The Facts contained in its Motion to Dismiss the appeal. These materials are set out on pages 1 to 10 of the Commission's Motion to Dismiss.

Questions Presented

1. Was the state trial court's refusal to grant petitioner an adjournment to await appellate review on related cases such an abuse of discretion as to deprive petitioner of the due process protection guaranteed by the Fourteenth Amendment to the United States Constitution, where petitioner was afforded an adequate opportunity to contest his commitment, and where the state courts have unanimously upheld the trial court's procedure as being in accordance with state civil procedure?

2. Did petitioner's commitment under a state court order requiring him to remain incarcerated until he performs a lawful act as directed by the court contravene the Fourteenth Amendment to the United States Constitution?

ARGUMENT

POINT I

Petitioner was accorded full due process protection during this proceeding.

The Commission's argument on this point is set forth at pages 16 to 19 of its Brief in Opposition to the Petition of Michele Miranda for a Writ of Certiorari (October Term, 1958, No. 893).

There are minor factual differences between the trial court hearings of petitioner and Miranda. These differences, however, do not affect the legal position of either. They have not been denied full due process protection, and their claims concern minutiae of state civil procedure which have been decided unanimously against them by the appropriate forum—the state's highest courts. Miranda is precluded from successfully establishing a due process claim because of his deliberate waiver of his right to contest on the merits by virtue of his special appearance. Petitioner, on the other hand, chose to avail himself of his opportunity for a hearing. He made extensive legal argument and offered factual representations; that they did not persuade and are unsubstantial is not a deprivation of due process.

Petitioner's argument before the trial court makes it perfectly clear that the sole purpose of his requested adjournment was to enable "this matter be held in abeyance until such time as the Appellate Courts have had an opportunity to pass upon this question . . ." (875). Petitioner, here, for the first time contends that the purpose of the adjournment was to allow him more time to contest on the merits. This contention is without merit. He never indicated during his argument before the trial court that he needed more time for preparation. In fact, he stated:

> "For me to make a lengthy argument, Judge, at this time, would be like carrying the coals to Newcastle . . . I'm afraid that Mr. Brill (counsel for Riccobono, who had just finished argument) has left me nothing but the hole in the bagel to argue about" (862).

As was pointed out in the Commission's response to Miranda, even if the purpose of the adjournment was to secure more time to contest on the merits, the trial Court's decision here in denying such a request in the exercise of its discretion would not amount to a deprivation of a fair hearing. *A fortiori*, refusal to grant an adjournment to wait appellate review in related cases cannot have denied petitioner his fair hearing or under any analysis rise to the dignity of such a deprivation of due process as to call for action by this Court. At best all that could happen is that the matter would be sent back to the trial court and inquiry made there as to whether petitioner refused to answer the questions put to him—an admitted fact.

Moreover there can be no serious claim of deprivation of rights on the ground of surprise, for two additional reasons. At the hearings petitioner was represented by counsel, and came fortified with prepared legal statements drawn in advance of the hearings, as did Miranda. Similarly, petitioner's attorney attended all prior proceedings resulting in the commitment of three other recalcitrant witnesses, thereby apprising himself of the legal consequences which might, and did in fact, result from his client's refusal to testify. Petitioner consciously and stoically made his choice: he was bound to defy this lawful inquiry and the Court even if it meant his imprisonment. No amount of rhetoric can avoid that obvious truth.

POINT II

Petitioner's confinement by the trial court until he performs a lawful act does not abridge his rights under the due process clause of the Fourteenth Amendment to United States Constitution.

Petitioner makes an additional argument which is also without substance. He claims this case presents "for the first time, the question whether a citizen can be kept in jail indefinitely without charge of crime under an order which permits his release only if he answers the various questions asked him 'truthfully and responsively'." (Petition, p. 4).

Petitioner fails to recognize the power of a court to coerce compliance with a lawful order is as old and established as the law itself. *Maggio* v. *Zeitz*, 333 U. S. 56 (1948); *Oriel* v. *Russell*, 278 U. S. 358 (1929); *Matter of Barnes*, 204 N. Y. 108, 97 N. E. 508 (1912); *J. R.* v. *M. P.*, Y. B. 37 Hen. VI, f. 13, pl. 3 (Ct. Common Pleas 1459). Persons so committed have "the keys of their prison in their own pocket". *Penfield Co.* v. *S. E. C.*, 330 U. S. 585, 590 (1947). The use of such coercive incarceration to compel testimony from a truculent witness is specifically recognized. *Accord*, *Ex Parte Hudgings*, 249 U. S. 387 (1919); *United States* v. *Appel*, 211 Fed. 495 (S. D. N. Y. 1913). Inclusion in the order of commitment of the duty already incumbent on any witness to testify "truthfully and responsively" adds nothing new.

Finally, petitioner's fear that his release is conditioned on *the Commission's* determination of the truth or falsity of his story is unfounded. *People ex rel. Falk* v. *Sheriff of New York County*, 258 N. Y. 437, 180 N. E. 110 (1932). In the very case which he cites, the Appellate Division ordered the release of one prisoner, despite the Commission's contention that the witness's testimony was not "truthful and responsive". *Valenti* v. *McClosky*, N. Y. L. J., March 30, 1959, page 11, *aff'd in part, and rev'd in part* by Appellate Division, N. Y. L. J., May 8, 1959, p. 12.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

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